Supreme Court, U.S.
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No. 03-1078

In The

Supreme Court of the United States

KENNETH MARK BROWN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Fifth Court Of Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an incriminating oral statement made by the accused in response to custodial interrogation admissible as "*res gestae* of the arrest" if the accused did not receive the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966)?

2. Does a conviction for capital murder violate due process where it is predicated on a murder committed during a burglary and the entry or attempted entry into the residence was not made with the intent to commit a felony other than the murder?

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PETITION FOR A WRIT OF CERTIORARI.

Kenneth Mark Brown respectfully petitions for a writ of certiorari to review the judgment of the Fifth Court of Appeals of Texas.

OPINIONS BELOW

The opinion of the Fifth Court of Appeals of Texas affirming the conviction is reported at 92 S.W.3d 655 (Appendix A). The opinion of the Texas Court of Criminal Appeals affirming the judgment of the Fifth Court of Appeals on an issue unrelated to this petition is not yet reported. 2003 WL 22849864 (Appendix C).[1]

JURISDICTION

The Texas Court of Criminal Appeals affirmed the judgment of the Fifth Court of Appeals on December 3, 2003. This petition is being filed within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person . . . shall be

[1] The Texas Court of Criminal Appeals denied review on the issues related to this petition (Appendix B).

compelled in any criminal case to be a witness against himself. . . ."

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall . . . be deprived of . . . liberty . . . without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Summary Of The Issues

Petitioner, while intoxicated and upset, went to the apartment of his estranged wife, armed with a pistol, upon learning that she was with another man. She partially opened the front door but would not let him enter. When he tried to prevent her from closing the door, she called to the man, who helped her try to close the door. Petitioner fired a shot through the closed door, striking and killing the man. He was convicted of capital murder for intentionally causing the death of the deceased during a burglary or attempted burglary of the apartment.

To convict petitioner of capital murder, the jury had to find beyond a reasonable doubt that he had the specific intent to kill the deceased when he fired the shot through the closed door; absent that specific intent, he would be guilty only of the lesser included offense of murder. The only contested issue at trial was whether petitioner had the specific intent to kill the deceased.

Petitioner surrendered to the police at the scene of the shooting. He opened the front door of the apartment, tossed his gun on the ground at the command of police officers who surrounded him with their guns drawn, and walked outside with his hands raised. Two officers tackled and handcuffed him. An officer patted him down, felt something in his pocket, and asked what it was. He responded, "Bullets. It's okay, I won't hurt you. I've killed everyone I wanted to kill." Even though petitioner was in custody, had not received the *Miranda* warnings, and responded to a question, the court admitted the statement over objection as *res gestae* of the arrest. The Fifth Court of Appeals affirmed, holding in effect that the *res gestae* rule trumps the requirements of *Miranda*. That decision is inconsistent with this Court's precedent prohibiting the admission of statements made in response to custodial interrogation prior to receipt of the *Miranda* warnings.

There is a conflict among several death penalty states on whether a murder committed during a burglary or an attempted burglary constitutes the offense of capital murder if the entry or attempted entry into the residence was not made with the intent to commit a felony other than the murder. Texas permits a conviction for capital murder where the entry was attempted for the sole purpose of committing the murder. This Court should resolve the conflict, as due process does not permit different standards across the nation for determining who is eligible for the death penalty for offenses committed under identical circumstances.

B. Procedural History

Petitioner was charged with capital murder. He pled not guilty. A jury convicted him, and the court assessed his punishment at life imprisonment on May 25, 2001.

The Fifth Court of Appeals affirmed the conviction in a published opinion issued on December 19, 2002. The Texas Court of Criminal Appeals granted review on an issue unrelated to the present petition and affirmed the judgment of the Court of Appeals on December 3, 2003. *Brown v. State*, 92 S.W.3d 655 (Tex. App. – Dallas 2002), *aff'd*, 2003 WL 22849864 (Tex. Crim. App. 2003).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED IN HOLDING THAT AN ORAL STATEMENT MADE BY THE ACCUSED DURING CUSTODIAL INTERROGATION PRIOR TO RECEIPT OF THE *MIRANDA* WARNINGS IS ADMISSIBLE AS "*RES GESTAE* OF THE ARREST."

Police officers arrived after the shooting and surrounded the apartment with their guns drawn. Petitioner opened the front door, tossed his gun on the ground at their command, and walked outside with his hands raised (4 R.R. 128-34; 5 R.R. 42-43, 57). Lieutenant Harry Manning and Sergeant Mike Glisch tackled and handcuffed him (4 R.R. 134-35).

The court conducted a hearing outside the presence of the jury to determine the admissibility of an oral statement. Lieutenant Manning patted down petitioner, felt

something in his pocket, and asked, "Do you have anything in your pockets?" (4 R.R. 156-57, 162-64). Petitioner responded, "Bullets. It's okay, I won't hurt you. I've killed everyone I wanted to kill." The court initially sustained petitioner's objection (4 R.R. 169).[2] The following day, the prosecutor reoffered the statement. Petitioner objected because he was in custody, had not received the *Miranda* warnings, and responded to a question (5 R.R. 7-8). The prosecutor argued that the *res gestae* rule trumped the requirements of *Miranda* (5 R.R. 9-10). The court changed its ruling and admitted the statement, acknowledging, "This is a close call [and] could serve as a legitimate basis of appeal" (5 R.R. 32-33).[3]

Lieutenant Manning and Sergeant Glisch testified before the jury that petitioner said that he was not going to hurt them, as he had "already killed everyone [he] wanted to kill" (5 R.R. 46, 60). The prosecutors argued during summation that this statement demonstrated petitioner's specific intent to kill the deceased (6 R.R. 14, 41).

The Fifth Court of Appeals held that petitioner's statement was admissible as *res gestae* of the arrest pursuant to article 38.22, § 5 of the Texas Code of Criminal Procedure, even though he made the statement in response to an officer's question prior to receipt of the

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[2] The court would have overruled the objection had it believed that the statement was volunteered rather than in response to a question.

[3] The court delegated its responsibility to determine admissibility to the prosecutor, stating, "I'm going to leave . . . it up to the State as to whether they wish to pursue it, knowing full well that this is a close call" (5 R.R. 33).

Miranda warnings. *Brown*, 92 S.W.3d at 660-61. The Court of Appeals relied on Texas cases that were decided before this Court held that *Miranda* was a constitutionally-based decision that cannot be overruled by statute. *See, e.g., James v. State*, 458 S.W.2d 654 (Tex. Crim. App. 1970).

An oral statement made by an accused in response to custodial interrogation prior to receipt of the *Miranda* warnings cannot properly be admitted on the theory that it was *res gestae* of the arrest. It is well-settled that a statement made by an accused in response to custodial interrogation is inadmissible unless he was first advised of his privilege against self-incrimination and his right to counsel. *Miranda v. Arizona*, 384 U.S 436 (1966). *Miranda* is a constitutional decision that cannot be overruled by statute – even an act of Congress. *See Dickerson v. United States*, 530 U.S 428 (2000). For article 38.22, § 5 of the Texas Code of Criminal Procedure to be constitutional, it must be interpreted to authorize only the admission of a custodial statement made by the accused that was not the result of interrogation. The Court of Appeals' interpretation – that the statute authorizes the admission of an oral statement made by an accused in custody, prior to receipt of the *Miranda* warnings, in response to an officer's question – would render the statute unconstitutional in light of *Miranda* and *Dickerson*. This Court should summarily reverse the conviction and remand to the Fifth Court of Appeals to determine harm. *See Kaupp v. Texas*, 538 U.S. 626 (2003) (murder conviction summarily reversed where Texas Court of Appeals failed to follow well-settled Supreme Court precedent regarding admissibility of confession). Alternatively, this Court should grant

certiorari to determine whether the *res gestae* rule trumps the requirements of *Miranda*. SUP. CT. R. 10(c).

II. THE COURT OF APPEALS ERRED IN UPHOLDING A CONVICTION FOR CAPITAL MURDER THAT WAS PREDICATED ON A MURDER COMMITTED DURING A BURGLARY WHERE THE ENTRY OR ATTEMPTED ENTRY INTO THE RESIDENCE WAS NOT MADE WITH THE INTENT TO COMMIT A FELONY OTHER THAN THE MURDER.

The indictment alleged that petitioner intentionally caused the death of the deceased during a burglary or attempted burglary of a habitation (C.R. 3). The evidence established that petitioner, while trying to enter his estranged wife's apartment, fired a shot through the closed front door that killed the deceased (3 R.R. 68-73).

Petitioner contended that the evidence was legally insufficient to sustain a conviction for capital murder because the State improperly used the murder twice to elevate the offense to capital murder. Petitioner's unlawful attempt to enter the apartment constituted a trespass unless he intended to commit a felony or theft, in which event it constituted a burglary or attempted burglary. TEX. PENAL CODE §§ 30.02(a)(1) and 30.05(a) (West 1998). The State used the murder to elevate the offense from a trespass to a burglary, and then used the fact that the murder was committed during the burglary to elevate the offense to capital murder. TEX. PENAL CODE § 19.03(a)(2) (West 1998). For a murder committed during a burglary or attempted burglary to constitute the offense of capital murder, the entry or attempted entry must be made with the intent to commit a felony other than the murder. It

violates due process to sustain a capital murder conviction where the entry was attempted for the sole purpose of committing the murder.

The Court of Appeals was compelled to reject petitioner's contention based on *Homan v. State*, 19 S.W.3d 847, 849 (Tex. Crim. App. 2000). *See Brown*, 92 S.W.3d at 659. Several death penalty states are in conflict on this important issue. California, Arkansas, Delaware, and New York will not uphold a capital murder conviction unless the burglary was committed with the intent to commit a felony other than the murder. *See Richards v. Superior Court*, 194 Cal. Rptr. 120 (Cal. App. 1983); *Parker v. State*, 731 S.W.2d 756 (Ark. 1987); *Williams v. State*, 818 A.2d 906 (Del. 2003); *People v. Cahill*, 2003 WL 22770167 (N.Y. App. 2003). Conversely, Mississippi, Utah, and Texas have upheld capital murder convictions where the burglary was committed for the sole purpose of committing the murder. *See Smith v. State*, 499 So.2d 750 (Miss. 1986); *State v. Tillman*, 750 P.2d 546 (Utah 1987); *Homan v. State*, *supra*. Due process cannot permit different standards across the nation for determining who is eligible for the death penalty for offenses committed under identical circumstances. Accordingly, this Court should grant certiorari to resolve the conflict among the state courts on this important question. SUP. CT. R. 10(b).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari and summarily reverse the judgment of the Fifth Court of Appeals of Texas or, in the alternative, order briefing and oral argument.

Respectfully submitted,

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APPENDIX A

AFFIRM and Opinion Filed December 19, 2002

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-01-01326-CR

KENNETH MARK BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 366th District Court
Collin County, Texas
Trial Court Cause No. 366-80704-00

OPINION

Before Justices Bridges, FitzGerald, and Lagarde.[1]
Opinion By Justice FitzGerald

Kenneth Mark Brown appeals his conviction for capital murder. After the jury found appellant guilty, the trial court sentenced appellant to life imprisonment. Appellant brings six points of error contending the evidence is legally insufficient and that the trial court erred by: (a) admitting appellant's oral statement; (b) overruling

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[1] Justice Ed Kinkeade was a member of the submissions panel before his retirement from the Court on November 18, 2002. Justice Sue Lagarde, Retired Justice, is sitting by assignment, and she has reviewed the briefs and the record in this case.

appellant's motions for mistrial; and (c) incorrectly charging the jury. We affirm appellant's conviction.

FACTUAL BACKGROUND

In March 2000, appellant was separated from his wife, Katrina, who had custody of their young daughter, Courtney. Appellant knew Katrina was dating a fireman, Theron Gray, and that she was pregnant with Gray's child. On March 28, 2000, after work, appellant and some friends from work went to a strip club. After hearing that bad weather was ravaging the Dallas/Fort Worth area, including a tornado in Fort Worth, the men called home to see that their families were safe. Appellant called Katrina and learned that Gray was in her apartment with her. When appellant returned to the table, he told his friends that he thought someone was at his wife's house, and he said, "I can't believe this, it sucks, this is B.S." After a period of time, appellant said goodbye to his friends and left the club.

Appellant went to his apartment, opened the door so violently that he damaged it, and went to his bedroom without saying a word to his roommate, Chris Morrow. After a few minutes, appellant left without speaking to Morrow. Morrow went to appellant's room and noticed that appellant's gun was missing. Morrow telephoned appellant's father, and they decided they should go to Katrina's apartment and tell her about appellant. Morrow got to Katrina's apartment about an hour after appellant had left his apartment. Morrow asked Katrina if appellant was there, and she told him he was not there. She told Morrow she was all right, and she would not allow him into her apartment. Morrow did not think appellant would actually

use the gun, so he left without warning Katrina that appellant might be armed.

Meanwhile, appellant had crashed his vehicle on the way to Katrina's apartment. He abandoned the vehicle and began walking down the highway. A passing motorist, William Orender, stopped and gave appellant a ride to a gas station near Katrina's apartment. Orender testified appellant seemed preoccupied during the trip but that he was very calm and not upset. Appellant arrived at Katrina's door a few minutes after Morrow had left. Appellant knocked on Katrina's door. Katrina thought Morrow had returned, and she opened the door slightly to tell him to go away. When she opened the door, appellant put his arm and leg in the doorway and tried to force his way in. Katrina screamed for help, and Gray came to the door and helped her try to prevent appellant from entering. Appellant said, "Are you ready to die?" and Katrina ran upstairs to call the police, leaving Gray to push the door closed. As she ran up the stairs, she heard a gunshot and saw Gray fall to the floor. Appellant's shot went through the door and then passed through Gray's head, rendering him immediately unconscious and quickly killing him.

Katrina's neighbor, Chris Daigle, heard the gunshot and then heard appellant say, "How does it feel to know you're about to die?" After appellant fired the gunshot through the door, Katrina called 911, and she heard two more gunshots. The telephone line went dead, and she saw appellant standing over her with the telephone cord pulled out of the wall. Katrina ran downstairs to check on Gray and saw that he was still breathing but that blood was coming from his nose and mouth. Appellant ordered Katrina upstairs and yelled at her, asking her why she

chose Gray over him and why she could not love him. Appellant looked down the stairs at Gray's body lying by the door and yelled at him, "You're not going to raise my daughter, you fucking . . . shit hole." Appellant told Katrina he was going to kill himself, he put the gun in his mouth, and he pulled the trigger twice; however, the gun did not fire. Appellant said, "Oh, shit," and he started to unload the gun. Katrina went into Courtney's bedroom, opened the window, pushed out the screen, and lowered Courtney and herself to the policemen standing below the window.

A few minutes later, the officer stationed at the front door of the apartment saw the door open a few inches and appellant standing in the doorway. The officer shouted for appellant to show his hands, and appellant put his hands and arms, holding the gun in his right hand, out the door. The officer had to shout several times to drop the gun before appellant complied and threw the gun out the door. Appellant came outside and was taken into custody. As the police handcuffed him, he told them, "I'm not going to hurt you guys. I've already killed everyone I wanted to kill."

SUFFICIENCY OF THE EVIDENCE

In his sixth point of error, appellant contends the evidence is legally insufficient to support his conviction because, appellant argues, when the State alleges capital murder in the course of committing burglary, the State may not use the same murder as the felony supporting the burglary and the charged murder. The court of criminal appeals has rejected this argument, and this Court is bound by the court of criminal appeals' holding. *See Homan v. State,* 19 S.W.3d 847, 849 (Tex. Crim. App.

2000). Accordingly, appellant's argument that the evidence is legally insufficient lacks merit. We overrule appellant's sixth point of error.

ORAL STATEMENT

In his first point of error, appellant contends the trial court erred in overruling his objection to the admission of appellant's statement to the officers that he had killed everyone he wanted to kill. In *Guzman v. State,* 955 S.W.2d 85 (Tex. Crim. App. 1997), the court of criminal appeals explained that the standard of review of a motion to suppress evidence depends on the type of question presented. It recognized three types of questions: (1) historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor; (2) application of law to fact questions, *i.e.,* mixed questions of law and fact, when the ultimate resolution of those questions turns on an evaluation of credibility and demeanor; and (3) mixed questions of law and fact when the resolution of those questions does not turn on an evaluation of credibility and demeanor. *See Loserth v. State,* 963 S.W.2d 770, 772 (Tex. Crim. App. 1998); *Guzman,* 955 S.W.2d at 89. In reviewing the first two types of questions, an appellate court shows "almost total deference" to a trial court's determination because of a trial court's exclusive fact-finding role and because a trial court is in an appreciably better position to decide the issue. *See Guzman,* 955 S.W.2d at 89. In reviewing the third type of question, where the resolution of the issue does not turn on an evaluation of credibility and demeanor, an appellate court is in as good a position to review the issue as the trial court; therefore, an appellate court determines the issue independently, or *de novo. See*

id.; *Lane v. State,* 971 S.W.2d 748, 751-52 (Tex. App. – Dallas 1998, pet. ref'd). In this case, the issue does not turn on an evaluation of credibility and demeanor; accordingly, we review the issue *de novo.*

Appellant objected to admission of his statement to the officers because it was unrecorded, it was a product of custodial interrogation, and it was made before appellant had received the mandatory admonishments. *See* TEX.CODE CRIM. PROC. ANN. art. 38.22, § 3(a) (Vernon Supp.2003). The trial court held a hearing outside the presence of the jury to determine the admissibility of the statement. Lieutenant Harry Manning testified he was patting down appellant when appellant made the statement and that the statement was not in response to a question. Officer Michael Glisch testified appellant made the statement in response to Manning's question, "Do you have anything in your pockets?" After originally sustaining appellant's objection to the admissibility of the statement, the trial court later changed its ruling and overruled appellant's objection.

Article 38.22, section 3(a) prohibits the admission of oral statements by a defendant unless (1) a visual recording is made of appellant making the statement; (2) the defendant is given the *Miranda* warnings; (3) the recording equipment is operating, the operator is competent, and the recording is accurate and has not been altered; and (4) all material voices are identified. *Id.* Article 38.22, section 5 permits the admission of an unrecorded oral statement by the defendant when the statement "is the res gestae of the arrest." *Id.* art. 38.22, § 5 (Vernon 1979). Clearly, appellant's statement, as he was lying on the ground being handcuffed and searched, was res gestae of his arrest. *Bryant v. State,* 816 S.W.2d 554, 556 (Tex. App.

– Fort Worth 1991, no pet.). That appellant had not received the *Miranda* warnings at the time he made the statement or that the statement was in response to a police officer's question does not prohibit admission of the statement. *Jones v. State,* 458 S.W.2d 654, 655 (Tex. Crim. App. 1970); *Bryant,* 816 S.W.2d at 556-57; *Smith v. State,* 737 S.W.2d 933, 940 (Tex. App. – Dallas 1987, pet. ref'd). Thus, the statement was admissible under section five of article 38.22.

We conclude the trial court did not err in overruling appellant's objection to the admission of this statement. We overrule appellant's first point of error.

THOMAS GRAY'S STATEMENT

In his second point of error, appellant contends the trial court erred by denying his motion for mistrial. Thomas Gray, Theron Gray's father, was the last witness to testify. After Thomas Gray had answered the prosecutor's last question, the following occurred:

[Prosecutor]:	Thank you, Mr. Gray. We're going to go ahead and pass this witness, Your Honor.
[Defense Counsel]:	No questions.
The Court:	Thank you, sir.
The Witness:	Give my son justice, please.
[Defense Counsel]:	I object to the –
The Court:	Mr. Gray, unfortunately, that's out of line. All right, call your next witness.

[Defense Counsel]:	I'll ask the jury be instruct[ed] to disregard.
The Court:	The jury will disregard.
[Defense Counsel]:	Move for a mistrial.
The Court:	Overruled.

Appellant presented evidence that Thomas Gray, also a firefighter, wore his dress fireman's uniform when he testified and that he cried and sobbed during his testimony. He made the statement, "Give my son justice, please," while looking at the jury, and it was "a forceful statement."

Appellant never stated the grounds for either his original objection or for his motion for mistrial. Therefore, appellant has not preserved any error from the denial of the motion for mistrial for our review. TEX. R. APP. P. 33.1(a)(1). However, in the interest of justice, we consider appellant's arguments on appeal.

We review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *See Ladd v. State,* 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Mistrial is a device used to halt trial proceedings when the error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *See id.* To determine whether a given error necessitates a mistrial, we must examine the particular facts of the case. *See id.* A mistrial is required only when the impropriety is clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced on the minds of the jury. *See Hinojosa v. State,* 4 S.W.3d 240, 253 (Tex.Crim.App.1999). An outburst by a witness or other bystander "will not result in reversible

error unless the defendant shows that a reasonable probability [exists] that the conduct interfered with the jury's verdict." *Stahl v. State,* 749 S.W.2d 826, 829 (Tex. Crim. App. 1988) (quoting *Landry v. State,* 706 S.W.2d 105, 112 (Tex. Crim. App. 1985)).

Appellant argues that this case is similar to that in *Stahl v. State.* In that case, a murder trial, a mother had to identify her dead son from a morgue photograph. *Id.* at 828. Before she testified, the trial court admonished her not to show any emotion when identifying her son. She told the trial court she would try not to show emotion, but "I can't say what's going to happen." *Id.* While testifying, the prosecutor asked her to identify the person depicted in an exhibit, and she cried out, "Oh, my God. My baby. My God." *Id.* The defense attorney asked to have the jury removed, but before the jury left the courtroom, the woman said, "May he rest in hell. May he burn in hell. Oh, my baby." *Id.* During the hearing following the witness's outburst, it became apparent the prosecutor expected the witness to have some type of emotional response in front of the jury. *Id.* at 829-30. The court of criminal appeals noted that during jury argument, the prosecutor "sought to exacerbate its impact on the jury." *Id.* at 830. The court of criminal appeals held that the witness's outburst, together with the prosecutorial misconduct, was harmful error and warranted a new trial. *Id.* at 831.

The facts of this case are not analogous to those in *Stahl.* In this case, the improper statement was not in response to a question from the prosecutor but occurred after the witness had been excused from the witness stand. Although the witness was crying during his testimony, he answered the questions appropriately, and appellant's only objection to his testimony was that one of

the answers was in narrative form. Unlike the prosecutor in *Stahl,* nothing in the record shows the prosecutor in this case expected the witness to make the improper statement after the witness was excused from the witness stand. The witness's improper statement, "Give my son justice, please," although forceful, was not the powerful personal attack on the defendant like that of the mother in *Stahl,* "May he burn in hell." *Id.* at 828. Finally, unlike the prosecutor in *Stahl,* the prosecutor in this case did not seek "to exacerbate its impact on the jury." *Id.* at 830. We conclude *Stahl* is distinguishable from this case and does not show the trial court abused its discretion in denying appellant's motion for mistrial.

Appellant argues Thomas Gray's testimony was unnecessary to the State's case. Appellant never objected at trial to the testimony on this ground. Even if any error were preserved, the relevance of the testimony does not affect the issue before us: whether Thomas Gray's statement after the completion of his testimony "interfered with the jury's verdict." *Id.* at 829 (quoting *Landry,* 706 S.W.2d at 112).

Appellant also argues the trial court's instruction to disregard was too perfunctory to cure the harm from Thomas Gray's inappropriate statement. We disagree. The trial court's instruction to disregard was immediate and instructed the jury to disregard. Appellant did not request any further instruction to the jury. We presume the jury followed the trial court's instruction to disregard. *Wesbrook v. State,* 29 S.W.3d 103, 116 (Tex. Crim. App. 2000). "Only offensive or flagrant error warrants reversal when there has been an instruction to disregard." *Id.* Thomas Gray's statement was neither so offensive nor so flagrant that the trial court's immediate reprimand of the witness and the

instruction to the jury to disregard could not have cured the error.

Appellant also argues the trial court's use of the word "unfortunately" in reprimanding Thomas Gray compounded the harm by suggesting the court believed the law should permit a parent of the deceased to make a personal plea to the jury for justice. Even assuming counsel's interpretation of the trial court's use of the word "unfortunately" were correct, appellant would have had to object to the trial court's comment to preserve error for our review. *See Blue v. State,* 41 S.W.3d 129, 131 (Tex. Crim. App. 2000) (objection required to preserve error from trial court's comment unless the error is fundamental affecting a substantial right such as the presumption of innocence). Appellant does not assert, and we do not perceive, that the trial court's use of the word "unfortunately" affected such a substantial right of appellant as the presumption of innocence. Accordingly, any error by the trial court in using the word "unfortunately" was not preserved for our review.

After reviewing the record, we conclude the record does not show Thomas Gray's statement to the jury asking for justice for his son affected the jury's verdict. Accordingly, we hold appellant has not preserved any error for review, and, even if any error were preserved, appellant has not shown the trial court abused its discretion by denying appellant's motion for mistrial. We overrule appellant's second point of error.

JURY CHARGE

In his third point of error, appellant contends the trial court commented on the weight of the evidence by

instructing the jury that it could infer appellant's intent from his acts done and words spoken. In *Cain v. State,* 549 S.W.2d 707 (Tex. Crim. App. 1977), *overruled on other grounds by Harrell v. State,* 659 S.W.2d 825, 826 (Tex. Crim. App. 1983), the court of criminal appeals stated an instruction "that intent may be inferred from acts done, if any, or words spoken, if any" avoided commenting on the weight of the evidence. *Id.* at 715. However, the Fort Worth, San Antonio, and Texarkana Courts of Appeals have declared such an instruction to be a comment on the weight of the evidence in violation of article 36.14 of the code of criminal procedure. *Ward v. State,* 72 S.W.3d 413, 418 (Tex. App. – Fort Worth 2002, no pet.); *Lam v. State,* 25 S.W.3d 233, 240 (Tex. App. – San Antonio 2000, no pet.); *Peterson v. State,* 942 S.W.2d 206, 207-08 (Tex. App. – Texarkana 1997, pet. ref'd); *see also* Tex. Code Crim. Proc. Ann. art. 36.14 (Vernon Supp. 2003) ("[I]n each felony case . . . , the judge shall, before the argument begins, deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence . . . ."). The courts of appeals' opinions are based on a series of opinions from the court of criminal appeals.

In *Browning v. State,* 720 S.W.2d 504 (Tex. Crim. App. 1986), the defendant was tried for burglary of a habitation. The jury charge instructed the jury that if it found the defendant had broken into and entered the building at nighttime, then "the defendant's intent to commit theft may be presumed from these facts, but you are not bound to so find." *Id.* at 507. The court explained the defect in such an instruction as follows:

> The jury was instructed that though they were not bound to so find, they *could* find appellant's

> intent to commit theft by finding only that he had entered the home at night, a fact appellant did not dispute. The jury was instructed, in other words, that they could ignore appellant's defensive evidence altogether. In giving such an instruction the trial court improperly commented on the weight to be given each party's evidence.

Id. at 507-08. One month later, in *Mercado v. State,* 718 S.W.2d 291 (Tex. Crim. App. 1986), an attempted murder case, the court of criminal appeals discussed the effect of instructing the jury that it could presume the defendant's intent to kill from the use of a deadly weapon. *Id.* at 292-93. The court of criminal appeals stated this jury instruction suffered the same defect as the jury instruction in *Browning.* "By singling out one reasonable inference, the trial court erred by improperly commenting on the weight of the evidence." *Id.* at 293. Ten years later, in *Garcia v. State,* 919 S.W.2d 370 (Tex. Crim. App. 1994) (opinion on reh'g, issued Mar. 27, 1996), a capital murder case, the defendant argued the trial court commented on the weight of the evidence by instructing the jury that "intent or knowledge may be inferred by acts done or words spoken." *Id.* at 396. The court of criminal appeals did *not* rule on the merits of the defendant's argument; the court "assum[ed], arguendo, that it was error to include the complained-of words in the jury charge," and held "that any error in including the words in the jury charge at the guilt/innocence phase to which appellant objects is harmless beyond a reasonable doubt." *Id.* at 396-97.

In *Peterson v. State,* the Texarkana court considered whether the jury instruction, "Knowledge, or lack of knowledge, may be inferred from the facts and circumstances," constituted a comment on the weight of the

evidence. The Texarkana court discussed *Browning* and noted that in *Garcia,* the court of criminal appeals had assumed the instruction in *Garcia* was error. *Peterson,* 942 S.W.2d at 207-08. Without further analysis, the Texarkana court concluded, "We are therefore constrained to hold that the charge here was an improper comment on the weight of the evidence." *Id.* at 208.

In *Lam v. State,* the trial court instructed the jury "that intent may be inferred from acts done, if any, or words spoken, if any." *Lam,* 25 S.W.3d at 240. The San Antonio court observed that in *Garcia,* the court of criminal appeals had assumed it was error for the trial court to so instruct the jury. *Id.* The court of appeals then stated, "Following the implicit holding of *Garcia,* we find that the challenged instruction in the instant case constituted an impermissible comment on the weight of the evidence, and therefore, we conclude the trial court erred in submitting it to the jury." *Id.*

In *Ward v. State,* the trial court instructed the jury, "A person's mental state may be inferred from words spoken and acts done." *Ward,* 72 S.W.3d at 417 (emphasis omitted). The Fort Worth court observed that the *Garcia* court did not hold this type of instruction was erroneous "but rather assumed that it was, and proceeded to conduct a harm analysis." *Id.* The Fort Worth court considered the court of criminal appeals' decision in *Browning* and then stated,

> Thus, while the court of criminal appeals has not held that the precise instruction challenged in the case now before us constitutes a comment on the weight of the evidence, we nevertheless find that it is sufficiently similar to the language that the court has held to be erroneous to cause

> concern. Taken in the context in which it was given, the instruction improperly tells the jury how to consider certain evidence before it. While it is indeed permissible for a jury to infer mental culpability from an accused's acts, words, and conduct, the trial court may not instruct the jury that it may apply such an inference.

Id. at 418.

We respectfully disagree with these three courts of appeals that an instruction to the jurors that they may infer a defendant's intent from his acts done and words spoken comments on the weight of the evidence. These three courts rely on *Browning* and its progeny, and the Texarkana and San Antonio courts also rely on *Garcia.* As the Fort Worth court observed, the court of criminal appeals in *Garcia* did not hold, expressly or implicitly, that such an instruction comments on the weight of the evidence. *See Ward,* 72 S.W.3d at 417. Thus, we must determine whether *Browning* and its progeny support holding an instruction that the jury may infer a defendant's intent from his acts done and words spoken comments on the weight of the evidence.

The instructions in *Browning* and *Mercado,* that the jury may presume intent to commit theft from breaking and entering a building at nighttime, or it may presume intent to kill from use of a deadly weapon, were comments on the weight of the evidence because they instructed the jurors that if they found a specific set of facts, they could presume the State had met its burden of proof as to one of the elements regardless of the rest of the evidence. *See Browning,* 720 S.W.2d at 507-08; *Mercado,* 718 S.W.2d at 293; *see also Alexander v. State,* 757 S.W.2d 95, 98-99 (Tex. App. – Dallas 1988, pet. ref'd) (instruction similar to that

in *Browning* deprived defendant of due process because "it removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption"). The instruction in this case, "Intent or knowledge may be inferred by [sic] acts done or words spoken," does not instruct on a presumption. It does not "singl[e] out one reasonable inference." *Mercado,* 718 S.W.2d at 293. It does not inform the jury that any *specific* words or acts could prove appellant had the requisite intent. Thus, we conclude *Browning* and its progeny do not support a holding that the instruction given in this case commented on the weight of the evidence.

We hold the trial court did not err in instructing the jurors that they could infer appellant's intent from his acts done and words spoken. We overrule appellant's third point of error.

JURY ARGUMENT

In his fourth point of error, appellant contends the trial court erred by denying a mistrial after the prosecutor commented on appellant's failure to testify. The defendant's state and federal constitutional and statutory right not to be a witness against himself prohibits the State from commenting on the defendant's failure to testify. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08 (Vernon 1979); *Montoya v. State,* 744 S.W.2d 15, 35 (Tex. Crim. App. 1987) (opinion on reh'g), *overruled on other grounds by Cockrell v. State,* 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *Sauceda v. State,* 859 S.W.2d 469, 474 (Tex. App. – Dallas 1993, pet. ref'd). The reviewing court considers the comment from the standpoint of the jury. *See Swallow v. State,* 829 S.W.2d

223, 225 (Tex. Crim. App. 1992); *Sauceda,* 859 S.W.2d at 474. For the prosecutor's argument to violate the defendant's right against self-incrimination and be reversible error, the argument must do more than merely imply or indirectly allude to the defendant's failure to testify; the argument must be manifestly intended or be of such a character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify. *See Montoya,* 744 S.W.2d at 35; *Sauceda,* 859 S.W.2d at 474. Language that can reasonably be construed to refer to a failure to present evidence other than from the defendant's own testimony does not comment on the defendant's failure to testify. *See Swallow,* 829 S.W.2d at 225. However, argument that points to a lack of evidence that only the defendant personally can supply violates the defendant's right against self-incrimination. *See id.; Sauceda,* 859 S.W.2d at 474. Accordingly, jury argument asserting the evidence is "undisputed" comments on the defendant's failure to testify when the defendant is the only person who could have disputed the State's evidence. *Carrillo v. State,* 821 S.W.2d 697, 699 (Tex. App. – Dallas 1991), *pet. ref'd,* 826 S.W.2d 955 (Tex. Crim. App. 1992) (per curiam).

During the prosecutor's jury argument, the following occurred:

> [Prosecutor]: Murder is defined . . . as, "intentionally or knowingly causes the death of an individual." There is no disputing here that this man, Kenneth Mark Brown, intentionally caused the death of an individual, specifically, Theron Gray, the victim in this case.

[Defense Counsel]:	Your Honor, object to [sic] as being a comment on the defendant's failure to testify.
The Court:	Well, the jury's been instructed on that already. Just don't make any comment about that.
[Defense Counsel]:	Your Honor, could we have a-ruling on my objection, please?
The Court:	I'll sustain the objection as to not making any more references to it.
[Defense Counsel]:	Your Honor, ask for an instruction to disregard the last statement.
The Court:	The jury will disregard the last statement.
[Defense Counsel]:	Ask for a mistrial.
The Court:	Overruled.

Appellant argues the prosecutor's argument, "there is no disputing . . . Brown intentionally caused the death of . . . Theron Gray," commented on appellant's failure to testify because it asserted appellant's intent was undisputed and appellant was the only person who could counter the State's evidence of his intent.[2]

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[2] At the outset, we note that appellant's objection at trial was not nearly as specific as his complaint on appeal. Appellee has not raised this concern, and the trial court did sustain the objection (at least "as to

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Appellant cites four cases in which prosecutors' statements that evidence was undisputed were held to be comments on the appellants' failure to testify. *See United States v. Cotnam,* 88 F.3d 487, 493, 499 (7th Cir. 1996) (prosecutor argued evidence "uncontroverted"); *Angel v. State,* 627 S.W.2d 424, 425-26 (Tex. Crim. App. [Panel Op.] 1982) (prosecutor argued evidence "not contested"); *Pollard v. State,* 552 S.W.2d 475, 476-77 (Tex. Crim. App. 1977) (prosecutor argued, "No one contradicts" complainant's testimony); *Carrillo,* 821 S.W.2d at 699 (prosecutor argued, "It's simple, it's not been uncorroborated evidence, it's not been disputed, it's just a simple case."). In each of these cases, the undisputed evidence concerned criminal transactions in which the defendant and one other person were the only participants.[3] *See Cotnam,* 88 F.3d at 499 (undisputed evidence concerned discussions between the defendant and co-conspirator); *Angel,* 627 S.W.2d at 426 (uncontested evidence was that defendant exposed himself to complainant when no one else was present); *Pollard,* 552 S.W.2d at 476-77 (uncontradicted evidence was that defendant carried a tire iron when he approached complainant's car; no witnesses other than complainant to this fact); *Carrillo,* 821 S.W.2d at 699 (undisputed evidence

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not making any more references to it"), so we resolve this issue on substantive grounds. However, we note our concern with the lack of specificity of the trial objection.

[3] Appellant also cites *Norton v. State,* 851 S.W.2d 341 (Tex. App. – Dallas 1993, pet. ref'd). In that case, the prosecutor argued, "Let's talk about the facts. There were only two people there and we heard from one of them." *Id.* at 344. This argument was clearly a direct comment on the defendant's failure to testify. *Id.* at 346. In this case, the prosecutor made no such statement. *Norton* is clearly distinguishable.

was of a drug transaction between defendant and undercover policeman with no other witnesses to the transaction). In the context of those cases, the prosecutors' arguments pointed to an absence of evidence that could have been supplied only by the defendants.

Unlike the cases cited by appellant, the prosecutor's argument in this case did not draw the jury's attention to an absence of evidence that could have been supplied only by the defendant. It is true that only appellant could have offered direct evidence of his intent, but this is the case in every criminal prosecution. Only the defendant knows for certain what is in his own mind. As a result, our system relies routinely upon circumstantial evidence of a defendant's intent. *See e.g., Maldonado v. State,* 998 S.W.2d 239, 243 (Tex. Crim. App. 1999); *Wolfe v. State,* 917 S.W.2d 270, 275 (Tex. Crim. App. 1996); *Jones v. State,* 34 Tex. Crim. 490, 492, 30 S.W. 1059, 1060 (1895); *Davis v. State,* 68 S.W.3d 273, 277 (Tex. App. – Dallas 2002, pet. ref'd). Thus, jury argument concerning intent will not be inherently erroneous as a comment on a defendant's failure to testify so long as circumstantial evidence of intent exists.

In this case, many witnesses testified about appellant's words and actions from the time he learned Gray was at Katrina's apartment until the time he was taken into custody. All of this testimony is evidence of appellant's intent. Indeed, appellant's intent to kill Gray was evidenced by his shouting, "Are you ready to die," and shooting through the door knowing Gray was on the other side of the door trying to push it closed. Appellant's intent was also evidenced by his saying to Gray, "How does it feel to know you're going to die," shooting Gray two more times, and telling the arresting officer he had killed everyone he wanted to kill. The prosecutor's argument that there "is no

disputing" appellant intentionally killed Gray was a reasonable deduction from the testimony of appellant's co-workers, Morrow, Orender, Daigle, Katrina, Manning, and Glisch about appellant's words and actions. Viewing the argument from the jury's perspective, we conclude the argument drew the jury's attention to the overwhelming evidence of appellant's intent to kill Gray and not to an absence of evidence that only appellant could have supplied. Thus, from the jury's perspective, the objected-to argument was not manifestly intended or of such a character that the jury would necessarily and naturally take it as a comment on appellant's failure to testify.

Moreover, the unusual posture of the defense in this case also supports the conclusion that the objected-to argument was not an inappropriate comment on the defendant's failure to testify. Throughout the trial, appellant's counsel's efforts were directed toward obtaining a verdict of murder as opposed to capital murder for appellant. Appellant's counsel made potential jurors aware in voir dire that to find appellant guilty of capital murder, they had to find appellant had the specific intent to kill Gray.[4] Similarly, during the opening statement, appellant's counsel conceded, "there will be no question" appellant fired the shot that killed Gray. However, appellant's counsel closed his opening statement by stating, "Nowhere is it legally going to be proven by the State that a capital murder occurred," *i.e.,* there will be no evidence appellant specifically intended to kill Gray. During closing argument,

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[4] Counsel spoke to the panel "hypothetically" about a defendant who fired through a door when explaining to them the requirement of specific intent to commit a crime.

appellant's counsel summarized the evidence during the trial and argued, "No specific intent to kill . . . . And that's what makes this case murder as opposed to capital murder." When the prosecutor recited the definition of murder and then echoed its language in her argument that "[t]here is no disputing here that this man, Kenneth Mark Brown, intentionally caused the death of an individual, specifically, Theron Gray, the victim in this case," she was making reasonable deductions from the evidence that appellant's counsel had made a number of times. Read in the context of the trial as a whole, the prosecutor's statement was not intended to comment on appellant's failure to testify any more than appellant's counsel's own statements commented on appellant's failure to testify.[5]

We conclude the prosecutor's argument was not a comment on appellant's failure to testify. Accordingly, we hold appellant has not shown the trial court abused its discretion by denying his motion for mistrial.

However, even if the argument were a comment on appellant's failure to testify, we would still conclude the trial court did not abuse its discretion by denying appellant's motion for mistrial because the trial court's prompt instruction to disregard cured any error. As the court of criminal appeals has stated, "the . . . presumption that an instruction [to disregard] generally will not cure [a] comment on [the] failure of the accused to testify . . . has been eroded to the point that it applies only to the most

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[5] We note that the prosecutor did not read the definition of felony murder to the jury, which would have been more appropriate in this instance. However, appellant did not object to that portion of the closing argument.

blatant examples. Otherwise, the Court has tended to find the instruction to have force." *Moore v. State,* 999 S.W.2d 385, 405 (Tex. Crim. App. 1999) (quoting *Waldo v. State,* 746 S.W.2d 750, 753 (Tex. Crim. App. 1988)). Whether the instruction cured the error is essentially a harmless-error determination. *See Hough v. State,* 828 S.W.2d 97, 100 (Tex. App. – Beaumont 1992, pet. ref'd) (citing *Orona v. State,* 791 S.W.2d 125, 128 (Tex. Crim. App. 1990) (former rule of appellate procedure 81(b)(2) [now TEX. R. APP. P. 44.2(a)] is standard of review for erroneous jury argument)). Thus, whether the instruction to disregard cured a violation of appellant's constitutional right against self-incrimination, and whether the trial court should have granted appellant's motion for mistrial, requires us to determine beyond a reasonable doubt if the comment on appellant's failure to testify contributed to his conviction. *See* TEX. R. APP. P. 44.2(a); *Hough,* 828 S.W.2d at 100.

In determining whether the State's jury argument contributed to appellant's conviction, we review the entire record in a neutral light and not in the light most favorable to the verdict. *Hernandez v. State,* 80 S.W.3d 63, 65 (Tex. App. – Amarillo 2002, no pet.); *Daniels v. State,* 25 S.W.3d 893, 899 (Tex. App. – Houston [14th Dist.] 2000, no pet.). We consider the impact of the error on the jury, including whether there is overwhelming evidence of appellant's guilt. *Motilla v. State,* 78 S.W.3d 352, 358 (Tex. Crim. App. 2002). We must determine "if there was a reasonable possibility that the error, either alone or in context, moved the jury from a state of nonpersuasion to one of persuasion as to the issue in question." *Wesbrook,* 29 S.W.3d at 119. "If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error is not harmless beyond a reasonable doubt."

McCarthy v. State, 65 S.W.3d 47, 55 (Tex. Crim. App. 2001), *cert. denied,* 122 S. Ct. 2693 (2002).

The jurors were aware that appellant had not testified. In addition, the trial court read them the jury charge before arguments began. Included in the jury charge was the following instruction:

> Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and, in the event he elects not to testify, that fact cannot be taken as a circumstance against him. *In this case, the defendant has elected not to testify,* and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

(Emphasis added.) After sustaining appellant's objection to the argument, the trial court instructed the jurors to disregard the prosecutor's statement.[6] "This Court has faith in the jury's ability to recognize, upon instruction, the potential for prejudice and to discount any prejudice during deliberations." *Carrillo,* 821 S.W.2d at 699.[7]

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[6] Additionally, the jurors were told during voir dire they could not consider the defendant's failure to testify against him, and they indicated by their silence they could follow that proposition of law.

[7] In *Carrillo,* this Court reversed appellant's conviction because, during jury argument, the prosecutor commented on the defendant's failure to testify. Although the trial court instructed the jurors to disregard the argument, we did not discuss the effect of the instruction on the error or conduct a harmless error analysis. *See Carrillo,* 821 S.W.2d at 699-700. Our reasoning in that case may have been

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The prosecutor's statement also concerned the state of the evidence of appellant's intent to kill Gray. The evidence of appellant's intent to kill Gray was overwhelming. Although appellant could not see Gray when he fired the fatal shot, he knew precisely where Gray was because he knew Gray was behind the door and he knew Gray was trying to push the door closed. Just before firing the fatal shot, appellant said, "Are you ready to die." When he was being handcuffed, he told the officers he had already killed everyone he wanted to kill. Thus, the jury had appellant's own statements at the time of the offense clearly showing his intent to kill Gray. No evidence, direct or circumstantial, indicates appellant did not intend to kill Gray when he fired the fatal shot.

Having reviewed the entire record, including the effect of the trial court's instructions in the charge and the court's instruction to disregard the prosecutor's erroneous argument, as well as the overwhelming evidence of appellant's intent, we conclude beyond a reasonable doubt that the prosecutor's objected-to argument did not contribute to appellant's conviction. Accordingly, we conclude the trial court did not err in denying appellant's motion for mistrial. We overrule appellant's fourth point of error.

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consistent with other cases. *See, e.g., Angel,* 627 S.W.2d at 425-26 (reversing without harm analysis). However, subsequent cases have held that prosecutorial comments on a defendant's failure to testify can be cured by an instruction to disregard, rendering any error harmless. *See, e.g., Moore,* 999 S.W.2d at 405-06. Accordingly, *Carrillo*'s application of the law to the facts in that case is no longer correct, and we choose not to follow *Carrillo.*

CUMULATIVE EFFECT OF ERRORS

In his fifth point of error, appellant contends "the cumulative effect of the errors committed requires a new trial." Appellant's point of error is premised on our finding the trial court erred under his previous points of error. However, as discussed above, the trial court did not err. Accordingly, appellant's argument lacks merit. We overrule appellant's fifth point of error.

We affirm the trial court's judgment.

/s/ Kerry Fitzgerald
KERRY P. FITZGERALD
JUSTICE

Publish
Tex. R. App. P. 47
011326F.P05

APPENDIX B

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

May 7, 2003
COA#: 05-01-01326-
RE: Case No. 0059-03
STYLE: BROWN, KENNETH MARK

On this day, the Appellant's Petition for Discretionary Review has been GRANTED. An original and eleven copies of the Appellant's brief must be filed with this Court within 30 days. The State's brief is then due 30 days after the timely filing of the Appellant's brief.

(GRANTED ON GROUND NO. 3 ONLY)
ORAL ARGUMENT IS
PERMITTED

Troy C. Bennett, Jr., Clerk

RANDY SCHAFFER
1301 MCKINNEY
SUITE 3100
HOUSTON TX 77010

APPENDIX C

[LOGO]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 0059-03

KENNETH MARK BROWN, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIFTH COURT OF APPEALS COLLIN COUNTY

COCHRAN, J., *delivered the opinion of the Court in which* KELLER, P.J., MEYERS, PRICE, WOMACK, JOHNSON and HOLCOMB, J., *joined.* HERVEY, J., *filed a concurring opinion in which* KEASLER, J., *joined.*

OPINION

(Filed Dec. 3, 2003)

Appellant appeared at his estranged wife's apartment one night and fired a shot through the front door, killing her boyfriend, Theron Gray. Appellant did not deny that he fired the fatal shot; rather, his defense was that he did not have any intent to kill Theron Gray. Over appellant's objection, the trial court instructed the jury that: "Intent or knowledge may be inferred by acts done or words

spoken." The jury convicted appellant of capital murder and sentenced him to life imprisonment. The court of appeals affirmed.[1] We granted review to decide whether "[t]he Court of Appeals erred in holding that the trial court properly instructed the jury that it could infer appellant's intent by his acts done and the words spoken." We hold that the court's instruction was an improper comment on the weight of the evidence, but that the error was harmless.

I.

Appellant and Katrina separated in June of 1998, and soon thereafter Katrina and Theron Gray were dating. Appellant learned about the new relationship, but the two did not immediately divorce. For more than a year, they often saw each other because of their daughter, Courtney, and they sometimes acted like they were still a couple. However, on March 26, 2000, Katrina asked appellant for a divorce because she was pregnant with Theron Gray's child and wanted to marry him. Appellant was angry, but said that he still wanted to be her husband and was willing to raise Theron's baby as his own. Katrina refused and left with the understanding that appellant would agree to a divorce. Two days later, appellant came to Katrina's apartment and shot Theron to death.

Appellant had spent the early part of the evening of March 28, 2000, at the Cabaret Royal drinking with friends. Around 8:00 p.m., he called Katrina from the club and learned that Theron was at her apartment. Appellant told his friends "I can't believe this, it sucks, this is B.S."

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[1] *Brown v. State*, 92 S.W.3d 655 (Tex. App. – Dallas 2002).

and left the club. He drove to his apartment, stormed through the door, went to his bedroom for about a minute, and left again – all without saying a word to his roommate, Chris Morrow, who was home watching television. Chris then went into appellant's room and noticed that his .357 revolver was gone. He called appellant's father and the two men decided to meet at Katrina's apartment.

Appellant crashed his car on the way to Katrina's apartment. He left the car and began walking down the highway. William Orender, who noticed that appellant looked clean-cut, stopped to offer help and gave appellant a ride to a gas station near Katrina's apartment. Orender said appellant seemed preoccupied, but was otherwise friendly.

Meanwhile, Chris arrived at Katrina's apartment. Her apartment, which was on the second floor, had a first floor entrance with a stairway down to it. Katrina came down the stairs to answer the door, but, thinking appellant was using Chris to get in, she sent Chris away. Shortly thereafter, appellant arrived and rang her doorbell.

Katrina went back down the stairs, cracked the door slightly, saw that it was appellant, and told him to go away. Appellant, angry and yelling, stuck his arm and leg in the door to prevent her from closing it. She told him she was going to call the police if he didn't leave. Theron, who was putting Courtney to sleep, came down the stairs, stood in front of Katrina, and pushed against the door. Appellant yelled, "Are you ready to die?" or "How does it feel to know you're about to die?" Katrina said, "He's got a gun." A neighbor also heard, "Oh, my God." Katrina started up the stairs to call 911, but she heard a shot, turned around, and saw Theron collapse. Appellant's shot went through the

front door and hit Theron in the head. He died almost immediately.

As Katrina continued up the stairs, she heard two more shots. Those shots also hit Theron. She called 911, but appellant had followed her up the stairs and yanked the phone cord out of the wall. Katrina ran back down the stairs to check on Theron, but appellant stood at the top of the stairs, pointed his gun at her, and told her to come back up. He continued yelling, asking her why she chose Theron over him, why she couldn't love him. Katrina went upstairs and into Courtney's room. Appellant meanwhile, stood over the balcony and yelled down at Theron something like "You're not going to raise my daughter, you f . . . s . . . hole."

Katrina shut Courtney's bedroom door, went to the window, and saw policemen outside. She told them someone was dead and that her "ex-husband" was still inside with a gun. The police helped Katrina and Courtney get out through the bedroom window.

Appellant eventually complied with police demands that he surrender. He walked out the front door carrying his gun, but put it down when police ordered him to. As he was being handcuffed, he told the arresting officer, "It's okay, I won't hurt you. I've killed everyone I wanted to kill." His pockets were full of bullets.

The trial judge's proposed jury instructions included the sentence: "Intent or knowledge may be inferred by acts done or words spoken before, during, or after the conduct in question." When appellant objected to this instruction, the prosecutor suggested deleting the phrase "before, during, or after the conduct in question," which the trial court did. Appellant nonetheless objected to the modified instruction.

In the course of affirming appellant's capital murder conviction, the court of appeals held that this instruction did not comment on the weight of the evidence or violate article 36.14.[2]

II.

Article 36.14 of the Code of Criminal Procedure requires the trial judge to give the jury:

> a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.[3]

In the Texas adversarial system, the judge is a neutral arbiter between the advocates; he is the instructor in the law to the jury, but he is not involved in the fray.[4] The advocates have the task of producing the evidence, arguing its significance, and pointing out the logical inferences that flow from that evidence. The jurors, meanwhile, are primarily passive listeners who are supposed to remain open-minded until the evidence is complete and the judge has given them the black-letter law in his written charge. "The adversary theory . . . maintains that the devotion of the participants, judge, juror and advocate, each to a

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[2] *Id.* at 665.

[3] TEX. CODE CRIM. PROC. art. 36.14.

[4] *See Lagrone v. State,* 84 Tex. Crim. 609, 615, 209 S.W. 411, 415 (1919) ("[t]he law contemplates that the trial judge shall maintain an attitude of neutrality throughout the trial").

single function, leads to the fairest and most efficient resolution of the dispute."[5]

Article 36.14 is a reflection of that devotion to a strict division of duties. The primary reason for the rule is that an instruction "by the trial judge to the jury on the weight of the evidence reduces the State's burden of proving guilt beyond a reasonable doubt to the jury's satisfaction."[6] In Texas, a trial judge must also must [sic] refrain from making any remark calculated to convey to the jury his opinion of the case.[7] As we have explained: "[j]urors are

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[5] *See Morrison v. State,* 845 S.W.2d 882, 885 (Tex. Crim. App. 1992). This strict division of labor has been explained as necessary because "maintaining juror impartiality [is] fundamental to adversarial integrity," and "[p]arty responsibility for the production of evidence insulates the jury, to the greatest extent possible, from the contest." *Id.* at 887 & 885. Accordingly, jurors in Texas are not allowed to actively participate in the trial – by, for example, soliciting evidence by questioning witnesses. *Id.* at 889. For the very same reasons, the judge ordinarily may not question witnesses in front of the jury. *Drake v. State,* 65 Tex. Crim. 282, 288, 143 S.W. 1157, 1160 (1912) ("in the examination of a witness, however fair-minded the judge may be, it would be almost impossible for him to so conduct it as not to suggest in some measure that he is on one side or the other. . . . By carefully attending to his own duties and conserving his own functions, he will best be able to hold the scales of justice impartially as between the counsel who are managing the case for and against the state; and, whenever he does interfere, it is generally at the expense of his own authority and dignity, which should be rigidly guarded, in order that he may administer the law with fairness and impartiality, and with that authority and power which pertains to the office").

[6] 43 DIX & DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 36.36 (2d ed. 2001).

[7] TEX. CODE CRIM. PROC. art 38.05 provides:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not

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prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved."[8] Thus, as an obvious example, a judge cannot tell a jury during guilt-innocence that it would reach the punishment phase the next day because the only reasonable inference for the jury is that the defendant's guilt had been established in the judge's mind.[9]

On the far end of the "improper-judicial-comment" scale is a comment or instruction that states a mandatory presumption and thereby violates due process. Mandatory presumptions violate due process by shifting the burden of production or proof to a criminal defendant on a critical

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it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

[8] *Lagrone,* 89 Tex. Crim. at 615-16, 209 S.W. at 415; *see also Harrell v. State,* 120 Tex. Crim. 359, 361, 47 S.W.2d 311, 311 (1932) ("[t]o the jury, the language and the conduct of the trial court have a special and peculiar weight"); *Davis v. State,* 114 Tex. Crim. 72, 74, 24 S.W.2d 417, 418 (1929) (quoting *Lagrone*); *Linton v. State,* 106 Tex. Crim. 165, 166, 291 S.W. 250, 251 (1927) ("[t]rial judges should be very guarded in their verbal statements or comments upon the testimony to and in the presence and hearing of the jury in order to avoid impressing the jury with the idea that the court entertained any impressions of the case which he wished them to know, and putting before them matters which should not enter into or affect their deliberation").

[9] *Jones v. State,* 788 S.W.2d 834, 835 (Tex. App.-Dallas 1990, no pet.) (during a break in deliberations at guilt-innocence, the court said, "Why don't we take a break and give it up for the evening. How does that sound? We have to go into the second phase tomorrow so we wouldn't be able to finish. . . . The second phase of the trial is going to be the punishment. It will probably be fairly short, probably fifteen minutes, probably twenty at the longest").

fact or element of the offense.[10] Thus, in *Francis v. Franklin*,[11] a case factually similar to this one – in which the defendant fired a shot through a door, killing someone – the Supreme Court held that the first two sentences of the following instruction violated due process:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.[12]

The Supreme Court concluded that this instruction constituted reversible error because "[t]he challenged sentences are cast in the language of command."[13] Standing alone, that language created an unconstitutional burden-shifting presumption on the element of intent.[14] The Court held

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[10] *Sandstrom v. Montana*, 442 U.S. 510, 514-19 (1979); *Ulster Cty. Ct. v. Allen*, 442 U.S. 140, 157-63 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 696-704 (1975)

[11] 471 U.S. 307 (1985).

[12] 471 U.S. at 311-12.

[13] *Id.* at 316.

[14] *Id.* at 318. And:

> In light of the instructions on intent given in this case, a reasonable juror could thus have thought that, although intent must be proved beyond a reasonable doubt, proof of the firing of the gun and its ordinary consequences constituted

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that, to meet due process, any such instruction must be permissive rather than mandatory ("you may infer" rather than "the law presumes"), and there must be a reasonably tight logical fit between the basic facts proved and the ultimate fact inferred. The inferred fact must be "more likely than not to flow from" the proven facts.[15]

Somewhere in the middle of the "improper-judicial-comment" scale are instructions on non-statutory presumptions or "vehicles employed to review the sufficiency of evidence."[16] Texas courts are forbidden from instructing the jury on any presumption or evidentiary sufficiency rule that does not have a statutory basis.[17] Accordingly,

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> proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise.

Id. at 319.

[15] *Allen,* 442 U.S. at 165.

[16] *Aguilar v. State,* 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); *see generally* 43 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 31.02 (2d Ed. 2001) (discussing distinction between judicial rules for assessing sufficiency of evidence and instructions given to the jury to use in certain circumstances).

[17] TEX. CODE CRIM. PROC. art. 38.04 provides that:

> The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence.

Some statutory presumptions which a jury may be instructed upon are: the presumption that a dealer in second-hand property who knowingly or recklessly fails to keep adequate records knew that stolen property in his possession was stolen when he paid twenty-five dollars or more for it (TEX. PEN. CODE § 31.03(c)(3)); the presumption that a person intends to avoid payment for services if he absconds without

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both appellate and trial courts may measure the sufficiency of evidence by resort to a judicial presumption, but the jury cannot be told of that presumption or rule. For example, the presumption of an intent to commit theft arises from the nonconsensual nighttime entry of a home or building.[18] But an instruction to the jury on this legal "presumption" is an improper comment on the weight of the evidence.[19] In *Browning v. State,*[20] we explained that giving an instruction to the jury on these judicial evidentiary sufficiency review rules improperly picks out one specific, though entirely logical, inference that could flow from the base facts from all other plausible inferences:

> In any given case the jury could make any number of reasonable inferences. But when the trial court, the only source of law the jury has, picks out only one such inference and instructs the jury that that one, though rebuttable, is a presumption provided by law, the court gives the force of law to that one possible inference. In fact neither statute nor caselaw provides such a "presumption" at the

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paying for services in circumstances in which payment is ordinarily made immediately upon rendering the service (TEX. PEN. CODE § 31.04(b)(1)); the presumption of recklessness and danger, under the deadly conduct statute, if a person knowingly points a firearm at or in the direction of another (TEX. PEN. CODE § 22.05(c)). TEX. PENAL CODE § 2.05 governs the use of the statutory presumptions. Its provisions are designed to ensure that the presumptions are permissive and therefore constitutional. *See Willis v. State,* 790 S.W.2d 307, 310 (Tex. Crim. App. 1990) (the Legislature enacted Section 2.05 " 'to specify the procedural consequences of a presumption [and] to satisfy . . . constitutional strictures' ").

[18] *Aguilar v. State,* 682 S.W.2d at 558.

[19] *Watts v. State,* 99 S.W.3d 604, 612 n. 25 (Tex. Crim. App. 2003).

[20] 720 S.W.2d 504 (Tex. Crim. App. 1986).

> trial level. Instructing the jury that it does constitutes, in effect, a comment on the weight of the evidence. We do not hold that the jury may not make such an inference, nor that an appellate court in reviewing the sufficiency of the evidence may not assume that the jury made such a reasonable inference. The error lies in *instructing* the jury that they may apply such an inference.[21]

Although these judicial review rules may state the obvious, they also inform the jury of the minimum amount of evidence from which they may find an element of the offense, *i.e.,* a person's intent. "But that is something for the jury itself to decide."[22]

Similarly, in homicide prosecutions, the defendant's state of mind is a question of fact that must be determined by the jury.[23] The intent to kill cannot be presumed as a matter of law. The jury may, of course, infer intent from any facts in evidence which it determines proves the existence of such intent to kill, such as the use of a deadly weapon.[24] Nevertheless, a court may not instruct a jury that "intent to kill may be inferred from the use of a deadly weapon" because that instruction would be an impermissible comment on the weight of the evidence.[25] It singles out a specific type of evidence and tells the jury that it may infer an element of the crime (such as criminal intent) from that evidence.

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[21] *Id.* at 507 (footnote omitted; emphasis in original).

[22] *Id.*

[23] *Smith v. State,* 965 S.W.2d 509 (Tex. Crim. App. 1998).

[24] *Hall v. State,* 418 S.W.2d 810, 812 (Tex. Crim. App. 1967).

[25] *Mercado v. State,* 718 S.W.2d 291, 293 (Tex. Crim. App. 1986).

Finally, a court's jury instruction could violate article 36.14 less obviously. For example, it might obliquely or indirectly convey some opinion on the weight of the evidence by singling out that evidence and inviting the jury to pay particular attention to it. On this near end of the "improper-judicial comment" spectrum is an instruction that is simply unnecessary and fails to clarify the law for the jury. The Austin Court of Appeals held the following instruction to be just that:

> You are instructed that if a Defendant allows his physical condition to deteriorate to such an extent that he thereby makes himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof he becomes intoxicated by the introduction of alcohol into his body, he would be in the same position as though his intoxication, if any, was produced by the use of alcohol alone and you find facts of the foregoing beyond a reasonable doubt.[26]

This instruction, according to the court of appeals, was improper because there was no evidence in the record establishing such a synergistic effect between fatigue and alcohol.[27] The instruction "allowed the State to engage in argument and speculation beyond any evidence contained in the record and to convince a lay jury from a 'common knowledge' point of view."[28] The court noted that, while the

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[26] *Atkins v. State,* 990 S.W.2d 763, 765 (Tex. App. – Austin 1999, pet. ref'd).

[27] *Id.* at 767-768.

[28] *Id.* at 768.

instruction itself was neutral, in context, it bordered on an improper comment on the weight of the evidence.[29]

With the "improper-judicial comment" scale in mind, we turn to the instruction given in this case.

III.

We conclude that the instruction "intent or knowledge may be inferred by acts done or words spoken" falls on the near side of the "improper judicial comment" scale. We remarked on the benign quality of this instruction some thirty years ago. As was pointed out by the court of appeals, in *Cain v. State*,[30] we stated that the trial judge's instruction that "intent may be inferred from acts done, if any, or words spoken, if any" avoided a comment on the weight of the evidence as prohibited by article 36.14.[31] However, in *Cain* we were reviewing, not the appropriateness of that particular instruction, but rather that defendant's claim that the trial court erred in failing to specifically instruct the jury that the *res gestae* statements admitted in evidence could be considered on the issue of intent. This Court's conclusion in *Cain* implied that the defendant's requested instruction was unnecessary and would have been a clear comment on the weight of the evidence.[32] In *Cain,* no one complained about the "intent may be inferred from acts done, if any, or words spoken, if any" instruction, thus this Court's statement was dicta.

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[29] *Id.*

[30] 549 S.W.2d 707 (Tex. Crim. App. 1977).

[31] *Id.* at 715.

[32] *Id.*

More recently, in *Garcia v. State,*[33] a capital murder defendant did argue on appeal that instructing the jury that "intent or knowledge may be inferred by acts done or words spoken" was a comment on the weight of the evidence.[34] But this Court, without addressing the merits of the question, held that any potential error was harmless under *Almanza.*[35]

The Fort Worth, San Antonio, and Texarkana Courts of Appeals, citing *Garcia,* have held that this, or a very similar instruction, is a comment on the weight of the evidence and does violate article 36.14.[36] In this case, however, the Dallas Court of Appeals disagreed. In a thoughtful and thorough opinion, the court found this particular instruction different from the instructions we have previously disapproved of because it did not instruct the jury that if it found a specific set of facts (such as breaking and entering a building at nighttime or the use of a deadly weapon), it could presume that the State had met its burden of proof as to one of the elements (such as intent to commit theft or intent to kill) regardless of the

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[33] 919 S.W.2d 370 (Tex. Crim. App. 1996) (op. on reh'g).

[34] *Id.* at 396.

[35] *Id.* at 396-97 ("[a]ssuming arguendo, that it was error to include the complained-of words in the jury charge" any error was "harmless beyond a reasonable doubt").

[36] *Ward v. State,* 72 S.W.3d 413, 418 (Tex. App. – Fort Worth 2002, no pet.); *Lam v. State,* 25 S.W.3d 233, 240 (Tex. App. – San Antonio 2000, no pet.); *Peterson v. State,* 942 S.W.2d 206, 207-08 (Tex. App. – Texarkana 1997, pet. ref'd). As pointed out by the Dallas Court of Appeals, all three of those courts relied on *Browning* and its progeny, and either relied on or mentioned *Garcia. Brown,* 92 S.W.3d at 664.

rest of the evidence.[37] The Dallas court held that the instruction in this case did not instruct on a presumption, single out one reasonable inference, or inform the jury that any specific words or acts could suffice to prove appellant had the requisite criminal intent. As such, it found *Browning* and its progeny did not support a holding that the instruction given in this case commented on the weight of the evidence.[38]

Although we recognize that it is a close call, we disagree. While the instruction is certainly neutral and it does not pluck out any specific piece of evidence, it does focus the jury's attention on the type of evidence that may support a finding of criminal intent. Thus, we agree with the Fort Worth court that the challenged instruction:

> is sufficiently similar to the language that the court has held to be erroneous to cause concern. Taken in the context in which it was given, the instruction improperly tells the jury how to consider certain evidence before it. While it is indeed permissible for a jury to infer mental culpability from an accused's acts, words, and conduct, the trial court may not instruct the jury that it may apply such an inference.[39]

We hold that this instruction marginally falls on the wrong side of the "improper-judicial-comment" scale because it is simply unnecessary and fails to clarify the

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[37] *Brown*, 92 S.W.3d at 665.

[38] *Id.*

[39] *Ward*, 72 S.W.3d at 418.

law for the jury.[40] It is not a statutory presumption, but it is a judicial review device for assessing the sufficiency of evidence to support a jury's finding of culpable intent. It is a common-sense tool for a trial judge to use in gauging the sufficiency of the evidence at a motion for directed verdict or motion for new trial and for sufficiency review by appellate courts, but it is not an explicit legal tool for the jury. Thus, the trial court erred in giving this instruction to the jury.

IV.

Almanza v. State[41] sets out the standard for analyzing harm from a jury charge error in a criminal setting:

> If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure the rights of defendant," which means no more than that there must be some harm to the accused from the error.[42]

That cannot be said of this instruction. The instruction is mild, neutral, and an obvious common-sense proposition.

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[40] At oral argument, appellant's counsel argued that judicial approval of this instruction might well open a "Pandora's box," with both the State and defense requesting jury charge instructions on other "benign" judicial review rules or extra-statutory factors that courts use in weighing sufficiency of the evidence or evaluating testimony. We agree that a bright-line rule disapproving the inclusion of even neutral judicial review rules or appellate presumptions in the jury instructions is easier for the bench and bar to administer, but we are unwilling to go that far today.

[41] 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)

[42] 686 S.W.2d at 171.

Appellant argues that the only issue in this case was intent, and therefore any improper judicial instruction relating to that one disputed issue was, *ipso facto,* harmful. He notes that the jury was charged on both capital murder and the lesser included offense of murder. If appellant meant to kill Theron, he committed capital murder. If appellant meant to pull the trigger but did not have the specific intent to kill, he committed murder. Of course, both the prosecution and the defense may argue the common-sense proposition that "intent or knowledge may be inferred by acts done or words spoken." Indeed, that is precisely what they did do. The State argued that appellant's acts and words demonstrated his intent to kill; the defense argued they did not.[43] The jury did not need any judicial instruction to focus its attention on the various statements appellant made the night he killed Theron or the various acts he performed both before and

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[43] The State, for instance, argued: "He stands over him firing more shots. That shows what his intent was. It also is clear what his intent was when he is taken out by the police, taken down to the ground, and as they are patting him down he makes the statement, 'You don't have anything to worry about. I'm not going to hurt you. I've already killed the person I came to kill.' That's his intent." And later: "You may infer intent from acts done or words spoken. Look at his acts. Look at his words."

The defense, in turn, pointed out that appellant actually said, "I killed the person I wanted to [not came to] kill." The defense suggested that although appellant may have wanted Theron dead, he did not intend to kill him that night; he might have just wanted to force his way in to talk to Katrina.

Both sides used the same common-sense proposition, that a person's intent may be inferred from his words and acts, to reach precisely opposite conclusions. It is hard to see, therefore, how one side was disadvantaged in this case by the trial court's instruction.

after the shooting. The advocates focused the jury's attention quite competently on the disputed issue, each side using exactly the same language as in the jury charge to prove its point.

Normally, we would remand to the court of appeals so that it could determine if there was harm, but because this instruction was benign, albeit improper, we hold that the error was not, in any sense, harmful under *Almanza*.[44] We therefore affirm the court of appeals.

Cochran, J.

Delivered: December 3, 2003.

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HERVEY, J., *filed a concurring opinion in which* KEASLER, J., *joined.*

CONCURRING OPINION

I disagree that the trial court commented on the weight of the evidence when it instructed the jury that "intent or knowledge may be inferred by acts done or words spoken." This instruction does not "express any opinion as to the weight of the evidence" which is what the plain language of Article 36.14, TEX. CODE CRIM. PROC.,

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[44] *Almanza*, 686 S.W.2d at 171. *See also Garcia*, 919 S.W.2d at 397 (any error in this instruction was harmless beyond a reasonable doubt); *Ward*, 72 S.W.3d at 418-19 (any error in this unobjected-to instruction did not rise to level of egregious harm); *Lam*, 25 S.W.3d at 240-41 (same).

actually prohibits. *See also Brown v. State,* ___ S.W.3d ___ slip op. at 6 (Tex.Cr.App. No. 0059-03, delivered this date) (comment on weight of evidence is "any remark [by the trial judge] calculated to convey to the jury [the trial judge's] opinion of the case"); *Watts v. State,* 99 S.W.3d 604, 611 n.24 (Tex.Cr.App. 2003) (Article 36.14 forbids trial judge from "any discussion in the jury's presence of evidence adduced at trial which might suggest to the jury the judge's personal estimation of the strength or credibility of such evidence or which might tend to emphasize such evidence by repetition or recapitulation"). In addition, Article 36.14 does not contain an "improper-judicial-comment" sliding scale as explained by the Court's opinion. *See Brown,* slip op. at 7 ("far end"), at 9 ("middle"), at 11 ("near end"). The Article 36.14 issue simply is whether the instruction "expresses [the trial judge's] opinion as to the weight of the evidence."

The resolution of this rather straightforward question is somewhat complicated by this Court's decisions in *Browning* and *Mercado. See Browning v. State,* 720 S.W.2d 504 (Tex.Cr.App. 1986); *Mercado v. State,* 718 S.W.2d 291 (Tex.Cr.App. 1986). The Court of Appeals, however, did a fine job of distinguishing these cases and explaining why they do not control the disposition of this case. *See Brown v. State,* 92 S.W.3d 655, 663-65 (Tex. App. – Dallas 2002).

Even so *Browning* and *Mercado* are somewhat problematical with the plain language of Article 36.14. *Browning* was a burglary of a habitation case in which the jury was instructed that it may presume the defendant's intent to commit theft from evidence that he broke into the building at nighttime. *See Browning,* 720 S.W.2d at 507-08. *Browning* decided that this was a comment on the weight of the evidence because the "jury was instructed, in

other words, that they could ignore appellant's defensive evidence altogether." *See id. Mercado* was an attempted murder case in which the jury was instructed that it could presume the defendant's intent to kill from the use of a deadly weapon. *See Mercado,* 718 S.W.2d at 292-93. Following *Browning, Mercado* decided that this was a comment on the weight of the evidence by "singling out one reasonable inference." *See id.*

It is difficult, however, to characterize these instructions as the trial court expressing its opinion on the weight of the evidence or the "judge's personal estimation of the strength or credibility of such evidence." And, with its use of such phrases as "in other words," *Browning* and *Mercado* apparently could only do so by recasting the instructions to say something that they really did not say.

This is not to say that the instructions in these cases were proper. But, if they were improper, it has to be for some other reason than that they were comments on the weight of the evidence. For example, it could be argued that they violated due process. *See generally Francis v. Franklin,* 471 U.S. 307 (1985). But, since these instructions (as the one at issue here) were not "cast in the language of command," then it is doubtful that they violated due process. *See Francis,* 471 U.S. at 311-18; *Brown,* slip op. at 7-8.

Since I cannot conclude that the instruction in this case was a comment on the weight of the evidence, I would decide, consistent with the approach in our decision in *Mendoza v. State,* that it is within a trial court's discretion to submit this instruction and that the trial court did not abuse its discretion to do so in this case. *See Mendoza v. State,* 88 S.W.3d 236, 240 (Tex.Cr.App. 2002). The Court's

"improper judicial comment" (far end, middle, near end) sliding scale[1] has the very real potential of creating wasteful future litigation particularly in analyzing jury instructions such as the one here that (if erroneous) are never harmful. In finding the error in this case harmless, the Court's opinion "in other words" says as much.

With these comments, I concur only in the Court's judgment.

Hervey, J.

Filed: December 3, 2003

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[1] *Brown,* slip op. at 12 (analyzing the instruction in this case with the "improper-judicial comment scale in mind") (internal quotes omitted).